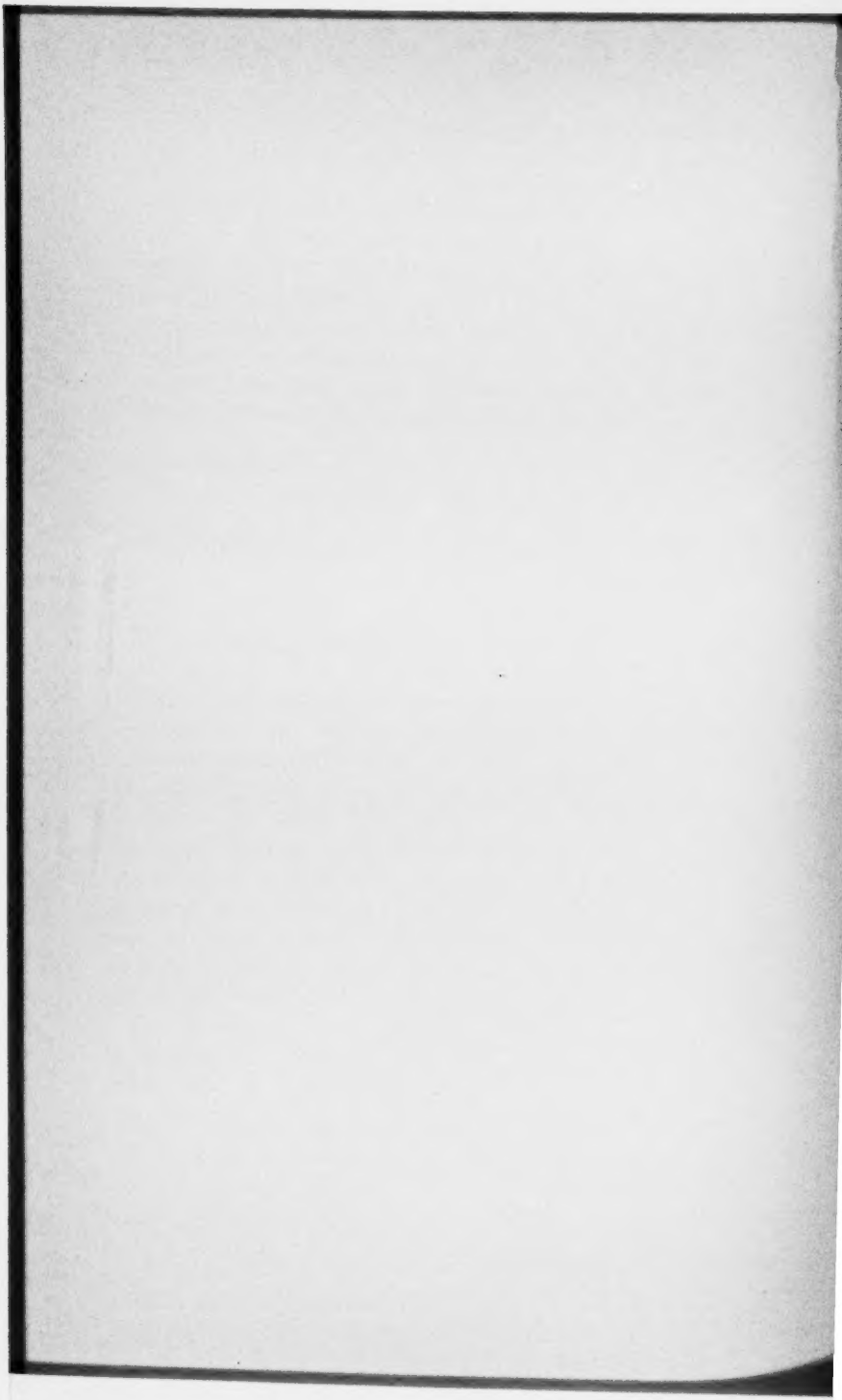

Supreme Court of the United States

OCTOBER TERM, 1940

No. 308

STATE OF MISSOURI, by and through the UNEMPLOYMENT COMPENSATION COMMISSION and HARRY P. DRISLER, Treasurer, *Petitioners*,

vs.

WARREN S. EARHART, Trustee in Bankruptcy for BURNAP-MEYER, INC., *Respondent*.

RESPONDENT'S STATEMENT AND BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT

Petitioners so confuse essential facts in a maze of detail and argument that we deem it necessary to restate the case:

Involuntary petition in bankruptcy was filed against Burnap-Meyer, Inc., on November 12th, 1936. Answer and petition of the bankrupt for reorganization under Sec-

tion 77-B of the Bankruptcy Act was filed and approved December 13th, 1936. Owner-management was accorded the debtor, which continued to April 14th, 1938, when a temporary Trustee was appointed.

On May 21st, 1938, a final order of liquidation was entered, the bankrupt's property ordered sold, and the case referred to the Referee.

There was realized in the liquidation an amount insufficient to pay the balance due merchandise and other creditors, including petitioners, on their allowed claims, all of which have been allowed as administrative expense, because these claims accrued while the bankrupt operated under the District Court's supervision through "owner-management." (Tr. 2-3).

The Missouri Unemployment Compensation Law became effective June 17th, 1937. Prior thereto Missouri had no such law. This Missouri Act was amended in 1939, but the amendments were effective long after this case was tried and are not controlling. (Tr. 3).

Petitioners claimed against the bankrupt estate for $1,559.26 for "contributions" alleged to be due under the Missouri Act for the period from January 1st, 1937, to April 14th, 1938, with interest. The claim was amended during the trial of Trustee's objections thereto, over Trustee's objection, to show the claim accrued during the period of owner-management. (Tr. 3).

The amount of contributions, based upon wages paid during the entire calendar year 1937, was $1,123.03; and upon wages paid after the effective date of the Missouri Act, $592.94. Those for the portion of the year preceding the Act's effective date were $530.09. The amount claimed for that part of 1938 from January 1st to April 14th was not in dispute. (Tr. 4).

The Federal Collector of Internal Revenue filed claims against the estate for the full two per cent provided under Title IX of the Federal Social Security Act covering the entire calendar year 1937 (Tr. 4, Ex. G, Tr. 19-20). Hearing provided in Sec. 64 of the Chandler Act (11 U.S.C.A. 1939, P.P. page 16) was had on all four of the Federal Collector's claims, including the full two per cent of wages for the calendar year 1937, resulting in the Referee's order (Ex. H. Tr. 21), by which these claims were allowed in the amount only of $564.58. No petition for review or appeal was taken, and the amount was promptly paid by the Respondent (Tr. 4-5).

After full hearing before the Referee on Respondent's objection to Petitioners' Amended Claim, the Referee found (1) it practicable to apply the Chandler Act to said claim; (2) that the "contributions" were not taxes within the purview of the Missouri Constitution; (3) that no recovery could be had of the $530.09 accruing before the effective date of the Missouri Act, because of the inhibition in the Missouri Constitution; (4) that no interest on the allowed portion of the claim would be granted; (5) that Petitioners' claim be allowed for $1,029.17, the contributions computed under the Missouri Act from June 17th, 1937 to April 14th, 1938, as an expense of administration, and be placed upon a parity with all other claims arising under "owner-management." (Tr. 5, Ex. I, Tr. 21-23).

Petitioners filed petition for review, and the case was heard thereon by Judge Reeves. He rendered a memorandum opinion (Tr. 6, Ex. J, Tr. 24-26), and entered a judgment confirming the Referee's order (Tr. 6, Ex. K, Tr. 27), which was in accordance with the memorandum.

Upon appeal to the Circuit Court for the Eighth Circuit the case was affirmed. In an opinion by Judge Thomas (Tr. 33-40), that court held it unnecessary to determine whether or not the contribution in question constituted a tax because by allowance of the claim as an administrative expense, it had been accorded a higher rating of priority than that claimed for it under Section 64 (a) (4), 11 U.S.C.A. 104 (a) (1).

An anomalous situation presents itself. Petitioners' claim was allowed below as an "administrative expense" and placed upon a parity with the other debts of the bankrupt accruing during the period of "owner-management." Under such circumstances, petitioners will realize in dividends eighty or ninety per cent of their allowed claim. Should petitioners sustain their contention, their claim would be relegated to the fourth class under Section 64 of the Chandler Act, and they would never collect one cent of their claim so allowed. Unless, therefore, petitioners are more interested in procuring a construction of a section since amended, than they are in adding to the Unemployment Compensation Fund, this application would appear ridiculous.

Reasons for Denying Writ

1. The petition for the writ does not comply with Rule 38 of the court, in that, it contains no statement particularly disclosing the basis upon which petitioners contend that this court has jurisdiction to review the judgment and decree in question, nor are the questions presented separately and cogently stated, as required by said Rule.

2. The petitioners' summary and statement of the matter involved and their supporting brief annexed to

said petition violate said Rule in that they fail to be a direct and concise statement of the case and the law applicable thereto.

3. The petition and supporting brief fail to disclose any special or important reasons impelling the exercise of this court's sound judicial discretion in granting the writ of certiorari, and assuming jurisdiction of the case. None of the reasons relied upon by petitioners for the allowance of the writ come within the purview of Rule 38, Par. 5.

4. The opinion below (Tr. 32-40) correctly determines the law with respect to the facts as set forth in the agreed statement of the case (Tr. 1-6).

BRIEF AND ARGUMENT.

I.

The petition for certiorari does not comply with Rule 38 with reference to statement of jurisdiction of statement of questions presented.

The petition contains no statement particularly disclosing the basis upon which petitioners contend this court has jurisdiction to review the judgment and decree in question. Nor have the questions presented been separately and cogently stated, as is required by Rule 38. The brief in support of petition, whether included in petition or printed separately, is not a part thereof and cannot expand or add to questions stated in the petition. *General Talking Picture Corporation* v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273.

II.

Petitioners' summary and statement of the matter involved is not a direct and concise statement of the case within the meaning of the rules of this court.

Reference to Respondent's statement aforesaid evidences that the petitioners, in their "Summary and Statement of the Matter Involved" have so garbled the essential facts in a maze of argument as to violate said Rule. Reference to the supporting brief evidences that it does not contain any direct and concise statement of the case and the law applicable thereto. Rule 38.

III.

Neither the petition for certiorari nor the supporting brief disclose any reason for the granting of the writ by this court within the purview of Rule 38, Par. 5.

Reference to the petition and supporting brief fails to disclose any special or important reasons impelling the exercise of this court's discretion in granting the writ, and thereby assuming jurisdiction of the case. None of the reasons assigned by petitioners for its allowance come within the purview of Rule 38, Par. 5.

IV.

Petitioners assign four specifications of error, summarize the argument and argue the petition for the writ under four headings. For the court's convenience, we will adopt the same order in argument as have petitioners.

(a) There was no error in refusing to allow Petitioner's claim for contributions prior to June 17th, 1937, the effective date of the Missouri Unemployment Compensation Act.

The Missouri Unemployment Compensation Act was passed, approved and effective June 17th, 1937. Prior thereto, Missouri had no such Act (Tr. 3).

Petitioners claim to be entitled to recover contributions covering the entire wages paid by the bankrupt during the calendar year 1937, *i. e.*, 1.8% on $62,390.65, or a total contribution for the calendar year 1937 of $1,123.03. It was agreed that the wages paid out prior to June 17th, 1937 by the bankrupt were $29,449.65, the contributions upon which, at 1.8% equaled $530.09 (Tr. 13). The Trustee maintained, and the Referee and the District Court and the Circuit Court properly found, that there could be no recovery for contributions claimed to have been due prior to the effective date of the Missouri Act. *Section* 15 of *Article II* of the *Missouri Constitution* (Mo. St. Ann. Vol. 15, page 304) provides:

"No *ex post facto* law, nor law impairing the obligation of contracts, or *retrospective in its operation,* or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly." (Italics ours).

In *Smith* v. *Dirckx,* 283 Mo. 188, 223 S. W. 104, 11 A. L. R. 510, the Missouri Supreme Court *en banc* held that an income tax law cannot include in its operation income received during the calendar year prior to its passage because of the aforesaid Constitutional provision that no law retroactive in its operation shall be passed. In so deciding the court significantly said:

"It will thus be seen that our Constitution contains an express inhibition against the passage of a 'law retrospective in its operation.'

"In the case of *Reed* v. *Swan,* 133 Mo. 100, l. c. 108, 34 S. W. 483, 484, Gant, P. J., speaking for the court, quoted with approval Mr. Justice Story's definition of a retrospective law as follows:

"'Every statute which takes away or impairs vested rights acquired under existing laws, *or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,* must be deemed retrospective.' (Italics ours).

"To the same effect are the following decisions: *Leete* v. *State Bank,* 115 Mo. 184, loc. cit. 198, 21 S. W. 788; *Bartlett* v. *Ball,* 142 Mo. 28, loc. cit. 36, 43 S. W. 783; *Bartlett* v. *Tinsley,* 175 Mo. 319, loc. cit. 332, 75 S. W. 143; *Rueckling Const. Co.* v. *Withnell,* 269 Mo. 546, loc. cit. 558, 191 S. W. 685.

"Applying the above definition to so much of the amendment of 1919, as undertook to assess an additional 1 per cent upon that portion of the net

income for the calendar year of 1919, which was received by appellant prior to the going into effect of said amendment, we are clearly of the opinion that it 'did create a new obligation or impose a new duty' in regard thereto, and that the amendment does to that extent operate retrospectively, and is in violation of the above-mentioned constitutional inhibition against retrospective laws. It would be difficult to reach any other conclusion while looking the Constitution squarely in the face.

"* * * It is a well-settled rule of law that, absent an express constitutional inhibition to the contrary, the General Assembly of a state or the Congress of the United States may pass a retrospective law, provided the law so passed does not violate some other constitutional provision. *Cooley's Constitutional Limitations* (7th Ed.) 529; 12 *C. J.* 1085. But when the Constitution expressly prohibits such a law as is the situation with which we are now dealing, quite a different situation is presented, and those authorities dealing with legislative action passed by legislative bodies not thus limited serve no useful purpose in the solution of the problem now presented."

See also *Graham Paper Co.* v. *Gehner,* 332 Mo. 155, 59 S. W. (2d) 49 and *State ex rel. Koeln* v. *S. W. Bell Telephone Co.,* 316 Mo. 1008, 292 S. W. 1037.

We therefore submit that under the Missouri Constitution and the decided cases by its Supreme Court, there was no error in holding that the claimant could not recover contributions for the period prior to the effective date of the Missouri Act.

Petitioners argue (Brief p. 20-25) that the Respondent herein alleging the unconstitutionality of a statute, must show beyond cavil that the statute in its operation injures the estate of which he is Trustee; and, that, if Respondent is not required to pay Petitioners the amount in contro-

versy, in any event, the same would have to be paid the Federal Government under Title IX of the Federal Social Security Act. The error in the assertion is patent.

The cases relied upon by Petitioner, such as *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374, have no application to the facts here presented. An analysis of the several citations contained in Petitioners' brief (p. 20-25) discloses that they, in varying verbiage, merely hold that one attacking a statute as unconstitutional, must show that "he has sustained or is immediately in danger of sustaining *some direct injury* as the result of its enforcement.

In the instant case, the record Exhibit "G" (Tr. 19-20) discloses that the Federal Collector of Internal Revenue filed a claim against the estate for the full two per cent of the wages paid by the bankrupt during the calendar year 1937, to-wit, for $1,247.81, due under Title IX of the Federal Social Security Act. These wages were paid by the bankrupt operating under owner-management during the entire year 1937 (Tr. 2). In any event, the claims of the Federal Collector were adjudicated by the Referee as is provided in *Section 64 of the Chandler Act* (11 *U. S. C. A.* 1939, *Pocket Parts, p.* 16). That Section provides that "in case any question arises as to the amount or legality of any tax, such question shall be heard and determined by the court." The Referee made an order thereon (Exhibit "H," Tr. 21), the material part of which is as follows:

> "Now on this 28 day of February, 1939, there coming on for consideration the claims of Dan M. Nee, Collector of Internal Revenue, filed herein in the following amounts: $397.26; $34.75; $107.12; $1520.29.

"After duly examining and considering said claims:

"It Is Ordered that all of the above claims, and any and all claims of the United States against this Estate, be and the same hereby are allowed in the total sum of $564.58, and the Trustee herein is directed to issue his check in payment."

No petition for review or appeal was taken from the above order of the Referee to the claims of the Federal Government with respect to the Federal Social Security Act, and the amount allowed was promptly paid by the Respondent (Tr. 4-5). Thus, the estate's liability to the Federal government has been fully adjudicated and terminated.

Petitioners herein cannot collaterally attack that final, binding and subsisting judgment. See *Oriel* v. *Russell*, 278 U. S. 358, 49 S. Ct. 173, 73 L. Ed. 419.

If the bankrupt estate is now required to pay the additional $530.09 to Petitioners, covering contributions on wages paid from January 1st, 1937 to June 17th, 1937, the effective date of the Act, the estate would be thereby injured and damaged to that extent.

Therefore, Respondent insistently maintains that, being injured by the attempted retrospective operation of the statute, he is at liberty to strike it down as infringing the Constitutional rights of those for whom he is Trustee.

(b) There was no error in not giving effect to Sec. 6 (C) (d) of the Missouri Unemployment Compensation Act.

Petitioners' Point II argues that if Section 6 (A) of the Missouri Act is retrospective, then Section 6 (C) (d) should be applied to obtain the same result. This amaze-

ing theory ignores the fact that this latter Section so construed would be subject to the same objection—it would be retrospective in its operation and reach back to a time prior to the Act's effective date. The argument that it levies a "tax" in addition to any tax under Section 6 (A) has two fallacies, (1) it is for the same purposes as the contributions under Section 6 (A), which we hereafter show is not a proper subject for taxation under the constitution and laws of Missouri; and (2) *Section* 3, *Article* X of the *Missouri Constitution* requires taxes to be uniform on the same class of taxpayers in the state. To use an outside standard, such as Section 6 (C) (d) to attempt to levy an additional tax on certain members of a class who do not pay under the rate established in the Missouri law enough to meet that standard, would violate this section of the constitution.

(c) No interest was allowable on Petitioners' claim.

The entire claim for contributions admittedly arose subsequent to the filing of the bankruptcy proceeding, and during the period of "owner management." Appellants urge that Section 15 (a) of the Missouri Act provides for the allowance of interest upon the several amounts from their due date to the date of payment at one per cent per month. They next make the ingenuous argument that Section 57 (j) of the Bankruptcy Act makes provision for the payment of this interest. In this they are in error because said provision has been held to apply solely to debts existing at the time of filing of the petition in Bankruptcy. See *Boteler* v. *Ingels,* 84 L. Ed. 20 "Adv. Opinions."

The contributions are not taxes, but constitute a mere civil debt. Petitioners cannot, therefore, claim any solace in *Section* 124 (a), *Title* 28, *U. S. C. A.* (Act of

June 18th, 1934), as that provision merely requires those enumerated therein, including bankruptcy trustees conducting a business "shall be subject to all state and local taxes applicable to such business the same as if such business were conducted by an individual or corporation."

Interest even on unpaid taxes, to be recoverable in bankruptcy, must be at a rate such as is generally fixed as compensation for the use of money by a private agent, as penalties are not collectible in bankruptcy. *New York* v. *Jersawit,* 263 U. S. 493, 68 L. Ed. 405; *In re Beardsley and Wolcott Mfg. Co.,* 82 Fed. (2d) 239, 104 A. L. R. 881. The fact that the amount imposed for non-payment of taxes is called "interest" in the taxing statute is not conclusive of its character in bankruptcy. *Re Ashland, etc. Co.,* 229 Fed. 829.

But aside from all these considerations, there can be no interest allowed in this case. The debtor's general creditors have allowed claims in excess of $100,000.00, and will never be paid a cent. Even the debts created by the bankrupt while under the Court's supervision through "owner-management," and temporary Trustee cannot be fully paid as to the allowed principal. Under such circumstances, interest is never allowable.

This Court, in *Thomas* v. *Western Car Co.,* 149 U. S. 95, 37 L. Ed. 663, following the rule in most state courts, laid down the definite rule that interest is not allowed against funds in the hands of the Court representatives from the time of their initial appointment. It was there said that the basis of the rule lies in the fact that the delay in distribution is the act of the law, and is a necessary incident to the settlement of the estate.

Interest will never be computed and allowed against the estate of the bankrupt or insolvent, where the assets

are insufficient to pay the principal of the debts. *American Iron Co.* v. *Seaboard Co.*, 233 U. S. 261, 58 L. Ed. 949; see also 39 A. L. R. l. c. 458.

There was, therefore, no error in disallowing interest.

***(d) Contributions for unemployment compensation payable under the Missouri statute are not taxes. There was no error in refusing to determine whether or not contributions under the Missouri Act were taxes, since by the allowance of petitioners' claim as an administrative expense it was accorded a higher rating of priority than that claimed for it under Section 64 (a) (4).* See Sec. 4 (a) (1) 11 U. S. C. A. 104 (a) (1).**

(1) SUCH CONTRIBUTIONS DO NO COME WITHIN THE CONSTITUTIONAL PROVISION WITH REFERENCE TO TAXES.

The taxing power of the Missouri General Assembly is limited by *Sec.* 3, *Art. X* of the *Constitution of Missouri* (Mo. Stat. Ann. Vol. 15, page 733) which provides:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general law."

The language of the trial court in its memorandum opinion (R. 25) aptly disposes of the contention that the Missouri Unemployment Compensation Act provides for the collection of a tax, in these words:

> "A very casual reading of the Missouri statute reveals that it is not a tax levied and collected within the purview of said Section 3."

The Missouri Act (*Laws of Missouri,* 1937, pp. 574-603 incl.) purports to be a full and comprehensive code in itself. Sections 8, 9, 10 and 11 of the Act (Laws of Missouri 1937, pp. 588-594) provide that *benefits* out of said fund shall be paid only to the eligible unemployed individuals therein enumerated, and not otherwise.

Section 12 (a) of said Act (*Laws of Missouri,* 1937, p. 595) provides:

> "*There is hereby established as a special fund, separate and apart from all public moneys or funds of this state,* an unemployment compensation fund, which shall be administered by the commission exclusively for the purpose of this Act. * * *"

The leading case interpreting the constitutional provisions with reference to taxes is *State ex rel Garth* v. *Switzler, Judge,* 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280, 65 Am. St. Rep. 653. In that case the Act under consideration attempted to levy a collateral succession tax on all property conveyed by will or by death of an intestate to any person outside of an enumerated class. The Act provided that the tax, when collected, should be placed in the State University Scholarship Fund to create a fund for maintaining free scholarships in the University to be distributed throughout the state on competitive examinations to applicants without means. The opinion of the court, holding the Act not within the constitutional taxing powers of the Missouri General Assembly, is an exhaustive treatise and detailed analysis of the constitutional provision. The court's construction of that provision is as follows:

> "We construe Section 3 of Article 10 of our constitution as a direct inhibition upon the general as-

sembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction. We shall assume without further comment that, if the act under review authorizes the levy of a tax, that tax must be for a public purpose; otherwise, it is a direct violation of the constitution of this state. * * *

* * * * * *

"In *Loan Association* v. *Topeka,* 20 Wall 655, a statute of the state of Kansas which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals came before the supreme court of the United States; and it was held void, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use, in the proper sense of these words.

"In *Allen* v. *Jay,* 60 Me. 124, a town, at a meeting legally called, voted to loan its credit to a firm to the amount of $10,000, and issue its bonds for that sum, provided the firm would invest $12,000 to $13,000 in a steam sawmill, with a run of stone to grind meal, and maintain it for ten years; and the legislature afterwards passed an enabling act authorizing said loan, but the supreme judicial court held the act unconstitutional and void because not for a public use.

"All the buildings on a very large portion of the City of Charleston, S. C., having been destroyed by fire, the city council passed an ordinance providing for the issue of bonds by the city to be loaned the owners, to build and rebuild the waste places and burnt districts. The legislature afterwards, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds, known as 'Fire

Loan Bonds,' and certain persons bought them. Afterwards suit was brought against the city to collect them but the supreme court of the state held said bonds were issued for a private purpose, and void. That the taxing power could only be exercised for some public purpose. *Feldman* v. *City of Charleston,* 23 S. C. 57.

"In November, 1872, a great conflagration swept over a large portion of the city of Boston. The legislature of Massachusetts passed an act authorizing the city of Boston to issue bonds, and loan the proceeds on mortgage to the owners of the land, to enable them to rebuild their houses. The supreme court held the act void; that it was not for a public object, in a legal sense. *Lowell* v. *City of Boston,* 111 Mass. 454.

"In *Curtis's Administrator* v. *Whipple,* 24 Wis. 350, the legislature empowered the town of Jefferson to raise a sum by taxation to be paid to the treasurer of the Jefferson Liberal Institute, a private educational institution, but the supreme court held the act void, the tax being for a private purpose; and a like conclusion was reached in *Jenkins* v. *Inhabitants of Andover,* 103 Mass. 94.

"This court, in *Deal* v. *Mississippi Co.,* 107 Mo. 464, 18 S. W. 24, held Sec. 5697 Rev. St. 1879, void, because it gave a bounty to private individuals for growing forest trees upon their own lands.

"In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burnt city, the establishment of manufactories and schools, would not sustain the tax Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages, benefits a community in one sense; but the indirect good which inures in this way furnished no basis for taxation of other business to build up such occupations."

The Missouri Act does not provide for these contributions to be used for public purposes, but rather, provides for contributions which, in reality, constitute an assessment against a class for the benefit of a class, and hence, it does not come within the purview of a constitutional tax. This is well pointed out *In re Farrell*, 211 Fed. 212 (D. C. Wash.) wherein the Trustee objected to the allowance as a tax of a claim filed by the Industrial Insurance Department of the State of Washington. The claim represented assessments made by the State Industrial Department against the bankrupt based upon its payroll of workmen engaged in extra-hazardous employment. The objection was upon the ground that the claim was not a tax. The court held that the order of the Referee allowing priority to the claim was erroneous and ordered the same allowed only as a general claim. In so doing, it said:

> "A 'tax' is defined as a pecuniary burden imposed for the support of the government. *United States* v. *Railroad*, 17 Wall. 322, 326, 21 L. Ed. 597. It is the enforced proportionate contribution of persons and property levied for the support of government and for all public things. *Opinion of Justices*, 58 Me. 591; *Cooley on Taxation*, 1; *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 19 L. Ed. 95; *Springer* v. *United States*, 102 U. S. 586, 26 L. Ed. 253.
>
> "'A "tax" is a pecuniary burden laid upon individuals and property for the purpose of supporting the Government.' *New Jersey* v. *Anderson*, 203 U. S. 483, 27 Sup. Ct. 137, 51 L. Ed. 284.
>
> "The assesment in issue is not to relieve the general taxpayer, but rather to relieve the employer from liability for injuries sustained by employees in extra-hazardous employments and to compensate such employees. It is an assessment against a class for the benefit of a class.

"The Supreme Court of Washington, in *State ex rel Davis-Smith Co.* v. *Clausen,* 65 Wash. 156, at page 203, 117 Pac. 1101, at page 1116 [37 L. R. A. (N. S.) 466], in passing upon the constitutionality of the Industrial Insurance Act, and considering it with relation to Article 7 of the State Constitution, says:

> "'It is manifest that it is not a tax in the sense the word is used in the sections of the Constitution to which reference is here made. No accession to the public revenue, general or local, is authorized or aimed at. The purpose of the exaction is entirely different. It is to be used, not to meet the current expenses of the government, but to recompense employees of the industries on whom the burden is imposed for injuries received by them while engaged in the pursuit of their employment. It is the consideration which the owners of the industries pay for the privilege of carrying them on.'

"It is manifest from a reading of Section 64 of the Bankruptcy Act which was passed prior to the passage of the Industrial Insurance Act of Washington, that Congress intended to include within said section only such taxes as were required to be paid into a common fund for the support of the government, national, state or municipal, and such a fund which would relieve the general tax payer from a payment of an unfair proportion of the expenses in the operation of the government, or a tax which would be by operation of law a lien upon property of the bankrupt estate."

The Farrell case quite well evidences what here appears. The Missouri Act seeks to assess a class, to-wit, employers, for the benefit of a class, to-wit, certain eligible employees, when and if they later become unemployed. The fund is segregated from public moneys and

is no accession from the public revenue, nor is it to be used for the payment of any current public expenses.

In the case of *In re Mosby Coal & Mining Co.*, 24 Fed. Supp. 1022, it was held by Judge Reeves, from whom this appeal is taken, that the claimant Drisler, in his official capacity, was not entitled to any lien for unpaid contributions under the Unemployment Compensation Act, and that such contributions were not taxes within the meaning of the Missouri Statutes creating a lien against the assets of corporations for unpaid taxes.

Other Missouri cases interpreting the constitutional prohibition aforesaid are:

In *Deal* v. *Mississippi County* 107 Mo. 464, 18 S. W. 24, 14 L. R. A. 622, the Missouri Supreme Court held that a statute providing that persons planting prairie land with forest trees and cultivating the same for three years shall receive a bounty thereafter for fifteen years from the County, contravened the aforesaid Constitutional provision.

In *Simmons Medicine Co.* v. *Ziegerheim,* 145 Mo. 368, 47 S. W. 10, the Missouri Supreme Court declared invalid as violating the aforesaid constitutional provisions a statute providing that every manufacturer of patent medicine shall pay a license which shall be turned into a fund for maintenance of free scholarships for students without means.

In *Ranney* v. *Cape Girardeau,* 255 Mo. 514, l. c. 518, 164 S. W. 582, l. c. 584, the Missouri Supreme Court distinguished between a tax under the Constitution and special assessments. "Such are," said the Court, "in a broad sense, referable to the taxing power." But they "are not taxes for public purposes or taxes at all within the purview and the sense of the Constitutional provi-

sion invoked or within the sense and purview of other sections of the article on revenue and taxation."

The cases cited in Petitioners' brief are not applicable, and are in no way controlling in the instant case. Petitioners argue that a tax by any other name is still a tax, and cite cases so holding. Respondent has no quarrel with this assertion, but maintains that before one may argue that a tax by any other name is still a tax, it must conform to the constitutional provisions with respect to taxation in the particular state where it is attempted to be levied. That an assessment called a "contribution" in some other state has been determined to be a tax in that state is of no binding force or effect in this state, wherein there is a constitutional requirement within which a levy must fall if it is to be construed to be a tax. Whether or not an Act provides for a tax is a matter that must be determined in accordance with the constitution and laws of the state wherein the same is levied. This is the holding of the Supreme Court of the United States in *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 81 L. Ed. 1245, l. c. 1252, wherein Mr. Justice Stone, speaking of the Alabama Act and of the decision of the Alabama Supreme Court in the case of Beeland Wholesale Co. vs. Kaufman, said:

> "The Supreme Court held that the contributions which the statute exacts of employers are excise taxes laid in conformity to the Constitution and laws of the state. * * * Its validity under the Federal Constitution is to be determined in the light of Constitutional principles applicable to state taxation."

We insistently maintain that the contributions provided for in the Missouri Unemployment Compensation

Act are not taxes within the meaning of the Missouri Constitution.

(2) CONTRIBUTIONS ARE NOT CONSIDERED TAXES BY THE MISSOURI ACT.

Section 12 (a) provides that all moneys collected shall be placed in a separate fund to be administered by the Commission exclusively, which fund is a *"special fund, separate and apart from all public moneys or funds of this state."*

Section 15 of the Act provides that if any employer defaults in the payment of any contributions, the amount thereof shall be collected by civil action in the name of the Commission (*Laws of Missouri,* 1937, *Section* 15 (b), page 599).

Subdivision (c) of Section 15 is as follows (italics ours):

> "In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims *except taxes and claims for wages* of not more than $500.00 to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extention proposal or composition, under the Federal Bankruptcy Act of 1898, as amended, contributions then or thereafter due shall be entitled to such priority as is provided in Section 64 (b) of that Act [*U. S. C. Title XI, Sec.* 104 (b)] as amended."

Subdivision (c) of the 1937 Act was omitted in the 1939 amendment (*Laws of Missouri,* 1939, Page 924).

Nowhere in the Missouri Act are the contributions referred to as "taxes." In the quoted subdivisions of Section 15, the contributions are expressly treated as something other than taxes. The contributions were not made a lien on any property of the employer by the 1937 Act. In the event of default, absent bankruptcy or court receivership, their payment could be enforced only by an ordinary civil action.

It would seem clear that the Legislature did not intend to give the contributions mentioned in the Act the force of a tax. It especially distinguished them from taxes when it said that under certain circumstances the contributions "shall be paid in full prior to all other claims except taxes and claims for wages of not more than $500.00 to each claimant earned within six months of the commencement of the proceeding."

It is therefore apparent, by the terms of the Act itself, that the Missouri Legislature, having in mind Sec. 3, Art. X, Missouri Constitution, did not consider or intend to consider claims for contributions to be claims for taxes.

(3) IT IS NOT NECESSARY IN THIS PROCEEDING TO DETERMINE WHETHER OR NOT THE CONTRIBUTIONS UNDER THE MISSOURI ACT ARE TAXES.

The Circuit Court did not err in finding it unnecessary to determine whether or not the contributions under the Missouri Act were taxes. The claim having been allowed as an administrative expense, it was accorded a higher rating of priority than that claimed for it by petitioners. We fully adopt what was said by Judge Thomas in the opinion (Tr. 35-37) with respect to that subject.

We earnestly insist that no right to the writ of certiorari has been shown, and it should be denied.

Respectfully submitted,
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